

NATIONAL LABOR RELATIONS BOARD

REGION THREE

Fused Solutions, LLC)	
)	
Employer)	
)	Case No. 03-RC-083193
and)	
)	
UFCW Local One)	
)	
Petitioner)	

EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT

Fused Solutions, LLC ("Fused"), by its undersigned counsel, hereby submits the following exceptions to the Hearing Officer's Report on Objections with Findings and Recommendations dated September 12, 2012. The Board should reject the proposed conclusions and recommendations of the Hearing Officer because the legal analysis employed in reaching those conclusions and recommendations is flawed.

The Hearing Officer reasoned that, because none of the cases cited by Fused in support of its objections to the election was factually identical to the circumstances that existed during the Fused election, there were insufficient grounds to set aside the election. The cases were supplied to the Hearing Officer to illustrate the appropriate decisional standard -- not to imply that the facts if the instant case are identical to those of the cases cited. In the instant case, the election should be set aside because the Union's actions destroyed the "laboratory conditions" required for a fair election and because it is probable that the Union's actions also disenfranchised a number of voters. *See N.L.R.B. v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 441-42 (4th Cir. 2002) (election must be set aside if union's conduct had a probable effect upon employees); *N.L.R.B. v. City Wide Insulation of Madison, Inc.*, 370 F.3d 654, 658-59 (7th Cir. 2004) (election

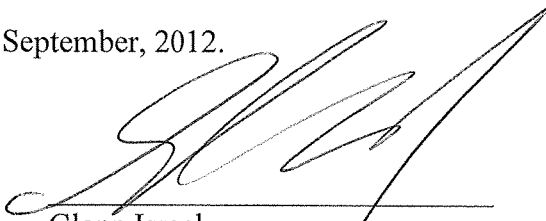
must be set aside if number of employees possibly disenfranchised is sufficient to affect outcome).

Based upon the testimony of Sherman Taylor (a bargaining unit employee) who stated that he had been told by a paid union organizer that, if he was not in favor of the Union he didn't have to vote because those employees who didn't vote would be counted as "No" votes and upon the testimony of Christina Hooper and Cynthia Bowen (two other bargaining unit members) who testified that they heard on election day from a number of other employees that they understood that failing to vote was the equivalent of a "No" vote, the Hearing Officer should have concluded that the Union engaged in conduct that caused a significant number of employees to erroneously believe that they did not need to participate in the election if they were opposed to the Union. Supervisor Matt Maroun corroborated the testimony of two of the bargaining unit members when he testified that Mr. Sherman and Ms. Hooper both approached him on election day and asked him whether a failure to vote was equivalent to a "No" vote. As would be expected, the paid Union organizer identified by Mr. Sherman denied making any misleading statements. However, given the fact that the three bargaining unit employees who were subpoenaed to testify had no reason to lie, the fact that the testimony of two of those witness was corroborated by a third witness, and the fact that the paid Union organizer had no reason to confess to misconduct, the only reasonable interpretation of this evidence is that the Union made misleading statements to eligible voters that caused them to believe that, if they did not support the Union, they did not need to vote.

The remaining question is whether there is a probability that those misleading statements affected the conduct of a sufficient number of employees to affect the outcome of the election. Only 34 of the 44 eligible voters participated in the election. Of the 34 ballots that were cast, 19

were cast in favor of the Union, 9 were cast against the Union, and 6 were challenged. If just 4 of the 10 employees who did not vote had voted against the Union, the challenged ballots would have been determinative and would have been counted. Thus, the confusion or disenfranchisement of just 4 voters by the Union's misleading statements could have affected the outcome of the election. Under these circumstances, the election must be set aside.

Dated at Portland, Maine this 25th day of September, 2012.



Glenn Israel
Linda D. McGill
Counsel for Fused Solutions, LLC

Bernstein Shur
100 Middle Street, P.O. Box 9729
Portland, ME 04104-5029
(207) 774-1200